sensitivity of rates in line with costs. For example, under expanded interconnection, IXCs will be able to avoid excessively distance sensitive LEC rates by taking service from CAPs or by taking advantage of expanded interconnection themselves.[495]

215. In light of these facts, we conclude that it would not be in the public interest to mandate the degree of distance sensitivity that LEC special access rates should reflect, and we decline to do so.

VIII. OTHER ISSUES

A. Legal Authority

216. Notice. We tentatively concluded that we have legal authority to implement expanded interconnection under Section 201 of the Communications Act.[496] Section 201 requires common carriers to provide service upon reasonable request, mandates that terms and conditions be just and reasonable, and authorizes the Commission to order interconnection in the public interest. We also tentatively concluded that Sections 201-205 of the Act[497] provide us with authority to adopt rate structure and pricing policies for expanded interconnection.[498]

217. Comments. A number of the LECs contend that the Commission lacks authority to mandate expanded interconnection for interstate special access. They argue that the Section 201(a) requirement that common carriers provide service "upon reasonable request" does not authorize the Commission to require a LEC to offer a service that the carrier has not chosen to provide.[499] U S West and Pacific assert that the "interconnection" for through routes referred to in Section 201(a) differs from the form of interconnection contemplated in this proceeding.[500] Ameritech argues that the Commission does not have authority to order interconnection with competing local carriers.[501] U S West, Pacific and Ameritech contend that the Communications Act does not give the Commission authority to order inter-

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495 Finally, the zone density pricing approach will allow LECs greater flexibility to have the greatest distance sensitivity in those areas where costs most warrant distance-sensitive pricing.

496 47 U.S.C. § 201.

497 47 U.S.C. §§ 201-205.

498 Notice, 6 FCC Rcd at 3269-70, ¶ 69.

499 See, e.g., BellSouth Comments at 44-45; Pacific Comments at 88. See also Ameritech Reply Comments, App. A at 1-6.

500 U S West Comments at 55; Pacific Comments at 88.

501 Ameritech Reply Comments, App. A at 1-6.

connection with noncarriers,[502] although U S West and Pacific acknowledge that the Act authorizes the Commission to mandate expanded interconnection with other carriers.[503] U S West argues further that if we rely on Section 201(a) to mandate interconnection, the requirement must be confined to carriers and that if we mandate interconnection universally, we must rely on the sections of the Act concerning prescription of service offerings and mandating of facilities.[504] NYNEX does not dispute the Commission's authority to order interconnection, but states that we must find that interconnection is in the public interest, not just that it will enhance competition, and that LECs must have an opportunity to earn a return on their investment.[505]

218. The CAPs and users submit that the Commission has ample authority to order expanded interconnection as proposed in the Notice, as well as the terms and conditions of such interconnection.[506] FMR contends that Sections 1 and 201 of the Act authorize the Commission to order expanded interconnection and that Sections 202 and 205 authorize adoption of the rate structures and other terms proposed in the Notice.[507] MFS argues that Section 205 gives the Commission power to prescribe terms and conditions for end user access.[508] Justice and WilTel contend that the Commission has legal authority under Section 201(a) to order physical collocation,[509] while the SBA argues that LEC refusal to interconnect with CAPs may violate the Sherman Antitrust Act's "essential facilities" doctrine.[510] MFS also disputes U S West's suggestion that the Commission has not established the necessary prerequisites to act under Sections 203, 205, and 214(d).[511] Similarly, the Bankers argue that U S West's interpretation of the Act "is predicated upon an untenably narrow reading of Sections 201, 202, and 203 and is unsupported

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502 U S West Comments at 54-55; Pacific Comments at 88; Ameritech Reply Comments, App. A at 3-5.

503 U S West Comments at 54; Pacific Comments at 88.

504 U S West Comments at 54 (citing Sections 203 and 205 of the Act regarding tariff rules and Section 214(d) regarding service provisioning).

505 NYNEX Comments at 72-73.

506 MFS Comments at 21; MFS Reply Comments at 27; Teleport Denver Comments at 15-16; FMR Comments at 19-26; GSA Comments at 22.

507 FMR Comments at 19-26.

508 MFS Reply Comments at 27.

509 Justice Reply Comments at 40-42; WilTel Reply Comments at 7-8. _See also_ MCI Reply Comments at 79-85.

510 SBA Comments at 5 & n.6.

511 MFS Reply Comments at 27.

by case law."[512]

219. Discussion. We conclude that the Commission has legal authority, pursuant to Sections 1, 4(i), 201, 202, 205, and 214(d) of the Communications Act, to require that the Tier 1 LECs implement expanded interconnection for interstate special access under the terms and conditions adopted in this Order. We also find ample legal authority in these sections of the Act for the rate structure and pricing measures that we prescribe today.

220. Section 201(a) authorizes the Commission, where necessary or desirable in the public interest, to order common carriers to establish physical connections with other carriers.[513] Contrary to the arguments of certain LECs, this language authorizes the Commission to require that the LECs provide interstate expanded interconnection service to carriers even though they might not do so voluntarily.[514] After thorough analysis of the record in this proceeding, we have concluded that the provision of expanded interconnection for special access by Tier 1 LECs will produce substantial public interest benefits by removing unnecessary barriers to increased competition.[515] LECs are "common carriers," physical and virtual collocation are forms of "physical connection," and the IXCs and most CAPs are "carriers." Thus, we have authority to order expanded interconnection for common carriers pursuant to this portion of Section 201(a).

221. Our authority to order the Tier 1 LECs to provide expanded interconnection for special access to customers that are not carriers flows from the language in Section 201(a) requiring that common carriers furnish communication service upon reasonable request and the Section 201(b) requirement that all charges, terms and conditions for service be just and reasonable. Given that the LECs will be obligated to provide expanded interconnection service to carriers, we believe that it would be unjust and unreasonable for them to deny end user requests for expanded interconnection. This conclusion also is supported by the nondiscrimination provisions of the

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512 Bankers Reply Comments at 6-7 & n.17.

513 47 U.S.C. § 201(a).

514 See Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092, 1103-06 (D.C. Cir. 1981). In Lincoln, the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's order requiring that Lincoln provide interconnection facilities to MCI over Lincoln's objections. The court explained that "under Section 201(a) . . . interconnections may be ordered by the Commission . . . after an affirmative public interest finding" and concluded that the Commission properly found interconnection to be in the public interest. Id.

515 See supra ¶¶ 13-18.

Act.[516]

222. Furthermore, it is established Commission policy not to distinguish between different types of customers in the access charge context. In the Access Charge proceeding,[517] for example, we required exchange carriers to develop charges that reflect actual usage of local exchange service by "all customers, regardless of their designation as OCC [other common carrier], enhanced service provider, or privately owned or leased system."[518] In interpreting this language, we stated that our purpose was to "eliminate so far as possible differences in services and rates based on whether the customer is a carrier or end user . . . [because] end users should be able to obtain access services offered to ICs [interexchange carriers] if they wish, in addition to services expressly reserved for end users."[519] The same rationale applies here because there is no sound reason to distinguish among potential customers of expanded interconnection services.

223. Section 205(a) of the Act also gives the Commission authority to order the LECs to provide expanded interconnection and to implement a new rate structure and pricing rules for expanded interconnection.[520] As noted earlier, the LECs' current special access tariffs make it economically infeasible for customers to combine their own or CAP facilities with portions of the LEC network to satisfy their special access needs.[521] As a result, the current access tariff structure represents a barrier to the further

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516 Section 202(a) states that "It shall be unlawful for any common carrier to . . . subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a).

517 MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983) (Access Charge Order), mod. on recon., 97 FCC 2d 682 (1983) (Access Charge First Reconsideration Order); 97 FCC 2d 834 (1984) (Access Charge Further Reconsideration Order).

518 Access Charge First Reconsideration Order, 97 FCC 2d at 722. Private systems would typically be classified as end users.

519 Investigation of Access and Divestiture Related Tariffs, 97 FCC 2d 1082, 1187 (1984), citing Access Charge First Reconsideration Order, 97 FCC 2d at 722. See also Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 931-32 (1984) ("rates and terms for use of a transmission service should not depend on the type of use or customer").

520 Section 205(a) provides that "Whenever . . . any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair and reasonable." 47 U.S.C. § 205(a).

521 See supra ¶ 4. See also supra ¶ 5.

development of special access competition. In light of our finding that the provision of expanded interconnection by Tier 1 LECs would produce substantial public interest benefits,[522] we conclude that continuation of the current special access rate structure by the Tier 1 LECs would be unjust and unreasonable in violation of Section 201(b) of the Act.[523]

224. Once we find that a rate, classification or practice violates the Act, Section 205(a) permits us, after full hearing,[524] "to determine and prescribe" the "just, fair and reasonable" rate, classification or practice to be followed in the future.[525] We believe that the expanded interconnection requirements and the new rate structure and pricing rules adopted today are "just, fair, and reasonable" for the reasons discussed in the prior sections of this Order. Thus, Section 205(a) authorizes us to prescribe the expanded interconnection architecture, standards, rate structure and pricing rules adopted in this Order.[526] Section 214(d) also gives us authority to require Tier 1 LECs to provide expanded interconnection.[527]

225. Sections 201 and 205 also provide the Commission with authority to permit Tier 1 LECs to implement a system of density pricing zones once expanded interconnection is operational in a given study area. We believe that our current requirement for study-area-wide special access rate averaging is no longer just and reasonable in the more competitive environment resulting from expanded interconnection. Accordingly, we modify this requirement with respect to rates for competitive special access services. Based on our review of the record, we believe that permitting Tier 1 LECs to implement the system of density pricing zones adopted in this Order

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522 See supra ¶¶ 13-18.

523 We have specifically found that non-Tier 1 LECs should not be required to provide expanded interconnection at this time. See supra ¶¶ 56-57. Therefore, continuation of the existing special access rate structure by these carriers would not constitute a violation of the Act.

524 A notice and comment rulemaking proceeding fulfills this requirement. United States v. Florida East Coast Railway Co., 410 U.S. 224, 238-46 (1973).

525 47 U.S.C. § 205(a).

526 This approach is consistent with our action in the Access Charge proceeding. See supra note 517. In the Access Charge Order, we established rules to govern the calculation of the rates IXCs and end users would pay for use of local telephone company access facilities. 93 FCC 2d at 245-46. In relying on Section 205(a), we reasoned, "[a]lthough the rules we are adopting will not establish the precise charge for most access elements, we are establishing many of the steps that carriers must follow in order to compute access charges. Our Section 205(a) power to prescribe charges includes the power to prescribe steps in the computation of charges." Id. at 256.

527 47 U.S.C. § 214(d).

will be just, fair and reasonable. This conclusion in no way undermines the Commission's commitment to geographic averaging of AT&T's interstate MTS rates.

226. Sections 1 and 4(i) of the Act provide further authority for the actions we take today concerning the implementation of expanded interconnection for special access and density pricing zones for LEC special access. Specifically, Section 1 states that the purpose of the Commission is to regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[528] Section 4(i)[529] authorizes the Commission to take whatever action is necessary to meet its statutory responsibilities. These provisions give the Commission broad authority to regulate telecommunications in the public interest.[530]

B. Fifth Amendment Issues

227. Notice. We stated that in light of the compensation proposed for LEC provision of expanded interconnection, we did not believe that our interconnection proposals raised questions of a taking without just compensation.[531]

228. Comments. A number of the LECs argue that mandated physical collocation would constitute an unlawful taking in violation of the Fifth Amendment of the United States Constitution.[532] These LECs generally contend

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528 47 U.S.C. § 151.

529 47 U.S.C. § 154(i).

530 See, e.g., New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1104, 1106-09 (D.C. Cir. 1987) ("Commission properly exercised its authority under Section 4(i) to remedy the [rate-of-return prescription] violation by ordering rate reductions"), cert. denied, 109 S. Ct. 1942 (1989); Lincoln Tel. & Tel. Co., 659 F.2d at 1107-08 ("under Section 154(i) . . . the Commission had authority to establish . . . an interim collection system"); Nader v. FCC, 520 F.2d 182, 203-04 (D.C. Cir. 1978) ("Commission's . . . order prescribing AT&T's rate of return was in the public interest, necessary for the Commission to carry out its functions in an expeditious manner, and within its Section 4(i) authority"); Access Charge Order, 93 FCC 2d at 258-59 ("Congress has conferred broad powers upon this Commission in Section 4(i) . . . [t]hose powers would be sufficient to enable us to adopt the access charge rules we are adopting").

531 Notice, 6 FCC Rcd at 3269-70, ¶ 6, n.58.

532 The Fifth Amendment provides that, "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. Thus, when the government takes private property for public use, it may avoid a constitutional violation by ensuring that the property owner receives just

that: (1) mandatory physical collocation would constitute a taking of property; (2) just compensation would therefore be required; (3) only courts, not regulatory agencies, can determine just compensation for constitutional purposes; (4) the Commission lacks authority to effect such a taking under the Communications Act; and (5) such a taking would be unlawful if carried out for a private purpose, such as to benefit the CAPs, rather than for a public purpose.

229. Justice, the CAPs, Ad Hoc and WilTel argue that mandatory physical collocation would not constitute a taking under the Fifth Amendment.[533] Justice specifically argues that case law treating a permanent physical occupation of the landowner's property as a "taking," even if the space occupied is de minimis, does not appear to be applicable to interconnection between common carriers in the regulated public utility context. Justice adds that this case law is not intended to work a substantial change in settled principles of public utility regulation.[534]

230. Discussion. The purpose of the Fifth Amendment is to ensure that the government compensates owners for use of their private property.[535] We believe that giving interconnectors a right to mandatory physical collocation does not violate the Fifth Amendment because it is not a taking. Even if it is a taking, the requirement does not violate the Fifth Amendment because: (1) we have authority to engage in takings; (2) the taking would be for a public purpose; and (3) we provide a mechanism for Tier 1 LECs to

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compensation.

533 MFS argues that physical collocation is incidental to physical interconnections under Section 201(a) and that Section 201(a) demonstrates a clear Congressional intent that the Commission regulate the physical terms of interconnection between carriers. MFS Comments at 21-22, 72-73 & n.94; MFS Reply Comments at 44-45. MFS also believes that physical collocation would not violate the Fifth Amendment as long as just compensation is prescribed for use of the property. MFS Comments at 22. Ad Hoc contends that mandatory physical collocation would not constitute a Fifth Amendment taking because it "(i) advances legitimate state interests, (ii) does not deny the LEC economically viable use of its property, (iii) does not represent a permanent physical occupation, and (iv) will be undertaken with the acquiescence of the property owner who voluntarily submitted to regulation in return for certification as a common carrier." Ad Hoc Reply Comments at 25-26. Ad Hoc also argues that even if physical collocation were a taking, the LECs would receive just compensation. Id. See also Ad Hoc Comments at 22-23. WilTel argues that because the occupation of LEC property would be for a public purpose and the LECs would be compensated for the use, a physical collocation requirement would not raise a Fifth Amendment takings issue. WilTel Reply Comments at 8.

534 Justice Reply Comments at 41.

535 Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-24, reh'g denied, 439 U.S. 883 (1978).

receive just compensation for use of their property.

231. The Physical Collocation Requirement Is Not a Taking. We believe that the expanded interconnection architecture that we implement today involving physical use of LEC central office space is not a taking under the Fifth Amendment, but rather lawful governmental public utility regulation. Courts use a facts and circumstances test to determine what constitutes a Fifth Amendment taking and focus on three principal factors: (1) the character of the governmental action; (2) the regulation's interference with investment-backed expectations; and (3) its economic impact.[536] Any single factor may determine whether there is or is not a taking.[537] In applying these factors, courts have found two limited types of regulations to be takings with little or no additional factual inquiry: (1) those that result in a permanent physical occupation;[538] and (2) those that result in a total economic deprivation of property.[539]

232. Despite the position of some parties in this proceeding, we do not believe that giving interconnectors a right to physical collocation is a per se taking under Loretto v. Teleprompter Manhattan CATV.[540] In Loretto, the New York State Commission on Cable Television required landlords to permit cable television operators to install cable on apartment buildings for a one-time $1.00 fee set by the Commission. The Court held that the physical occupation constituted a per se Fifth Amendment taking.[541] We believe, however, that Loretto differs from our collocation requirement in several important ways and that it is not the proper paradigm for evaluating the constitutionality of the regulation.

233. First, the governmental action in Loretto was very different from that here. Our authority to order physical collocation derives from our

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536 See Penn Central, 438 U.S. at 123-24. See also Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

537 See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (Court held no taking based only on degree of interference with investment-backed expectations because it found that factor alone to be "so overwhelming . . . that it disposes of the taking question").

538 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982) (permanent physical occupation is a taking without consideration of other factors). See also Yee v. City of Escondido, 112 S. Ct. 1522, 1526 (1992) (a permanent physical occupation "generally requires compensation").

539 See Lucas, 112 S. Ct. at 2893-95, 2899-2902 (1992) (zoning regulation that caused total economic deprivation of residential coastal property was a taking, unless the state could demonstrate that the proposed use already was prohibited under state property or nuisance law).

540 458 U.S. 419 (1982).

541 Id. at 426.

jurisdiction over interstate common carriers and our specific statutory mandate under Section 201(a) to order common carriers to provide physical interconnections in the public interest. Any per se rule, including the Loretto per se rule, is not reasonably applicable to a regulation covering public utility property owned by an interstate common carrier subject to the specific jurisdiction of this agency.[542]

234. In addition, although the Loretto Court announced a per se rule regarding permanent physical occupations, it identified several factors that comprise the rights of a property owner.[543] In light of those factors, our action in this case is significantly less intrusive than that in Loretto; we have carefully designed terms and conditions governing the physical collocation requirement so as to be as non-intrusive as possible[544] while at the same time creating the environment most conducive to competition.

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542 We agree with the Department of Justice that Loretto does not appear to apply to necessary interconnection in the regulated public utility context. Justice Reply Comments at 41.

543 These factors include the right to: (1) possess the property oneself; (2) control the timing, extent and nature of an invasion; (3) exclude an occupier from possession and use; (4) control actual use of the property; (5) obtain a profit from the property; (6) avoid adverse effect on the sale or transfer of the property; (7) prevent invasion and occupation by a stranger; and (8) be free from a third party's complete dominion over the property. Loretto, 458 U.S. at 435-37.

544 For example, Tier 1 LECs will have some control over the use of central office space by both fiber optic and microwave interconnectors. They will be entitled to designate, within reason, the specific space within or upon their central offices in which to house interconnector equipment, and will not have to surrender any central office space currently in use or reserved for future use. By contrast, the landlords affected by the cable ordinance covered by Loretto apparently had no control over the location of the television cable. In addition, Tier 1 LECs will be able to negotiate reasonable terms for interconnector entry onto LEC property, including access to rooftop facilities in the case of microwave interconnection. Tier 1 LECs and interconnectors will jointly negotiate security arrangements to govern entry into the LEC building. Finally, Tier 1 LECs can seek to negotiate virtual collocation arrangements, and we have provided for exemptions from the physical collocation requirement in certain circumstances. The landlord in Loretto had no such flexibility.

We also note that Loretto's per se physical occupation rule has limited applicability. "Our holding today is very narrow." Loretto, 458 U.S. at 441. See also FCC v. Florida Power Corp., 480 U.S. 245, 251 (1987) ("We characterized our holding in Loretto as 'very narrow'); Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (Court did not apply the Loretto per se test where the state required a landowner to convey an easement across the property in return for a building permit).

235. Thus, the appropriate analysis of our physical collocation requirement is the three factor test, without operation of the Loretto per se rule. Looking first at the nature of the governmental action, we find that the physical collocation requirement is a legitimate exercise of our authority under the Communications Act to regulate interstate common carriers. Section 201(a) authorizes us to order carriers to provide physical interconnections in the public interest,[545] which necessarily empowers us to determine the most reasonable means for implementing interconnections. Physical collocation is a reasonable means of implementation for two simple reasons. First, technically, the equipment only can be housed in a LEC central office; and second, to prevent the potential for anticompetitive conduct by the LECs and foster achievement of the benefits of expanded interconnection, it is necessary to provide interconnectors access to that equipment. Thus, we are merely directing common carriers to use their lawfully regulated property in a manner that benefits the public.[546]

236. The second factor in a takings inquiry is an owner's reasonable investment-backed expectation concerning its property. Given their unique position as common carriers controlling bottleneck facilities, LECs must be deemed to expect that their property will be subject to Title II regulation, including interconnection requirements. Regulatory agencies have ordered access to common carrier bottleneck facilities for the purpose of increasing competition and facilitating the development of new services,[547] or have imposed other requirements to satisfy statutorily-mandated public interest objectives.[548] For example, in Ruckelshaus v. Monsanto Co.,[549] the

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545 47 U.S.C. § 201(a).

546 Over a hundred years ago, the Supreme Court affirmed the common law principle that private property used for common carrier purposes is imbued with a public character. Munn v. Illinois, 94 U.S. 113, 126 (1876).

547 See, e.g., United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912) (antitrust court ordered railroads to provide competitors equivalent access to bottleneck railway terminal facilities), appeal after remand, 236 U.S. 194 (1915); Cellular Communications Systems, 86 FCC 2d 469, 495-96 (1981) (Commission required telephone companies to furnish interconnection to cellular systems upon terms no less favorable than those used by or offered to wireline carriers), modified, 89 FCC 2d 58 (1982), further modified, 90 FCC 2d 571 (1982); Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 RR 2d 1275 (1986), clarified, 2 FCC 2d 2910 (1987), aff'd on recon., 4 FCC Rcd 2369 (1989) (Commission clarified policies regarding interconnection of cellular and other radio common carrier facilities to landline network); Lincoln Tel. & Tel. Co., 659 F.2d at 1103-06 (court upheld Commission's order requiring Lincoln to provide interconnection facilities to MCI).

548 For example, in CPE Detariffing, the Commission required AT&T to detariff and sell its customer premises equipment (CPE). CPE Detariffing (Computer II), 95 FCC 2d 1276, 1295-96, recon. denied, 100 FCC 2d 1290 (1983). We rejected AT&T's Fifth Amendment claim because we found that the

Court held that an Environmental Protection Agency (EPA) regulation requiring applicants for pesticide registrations to submit trade secret data that would be disclosed to other parties did not violate the Fifth Amendment.[550] The Court found that "such restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community'"[551] and that the company submitted the data in voluntary exchange for the economic advantages of a pesticide registration.[552] Likewise, Tier 1 LECs are exchanging compliance with lawful Commission regulation under Title II of the Act for the valuable privilege of providing telephone service to the general public as interstate dominant common carriers.

237. Finally, the third factor in a takings inquiry considers the economic impact of the regulation on the property owner. Tier 1 LECs will suffer little adverse economic effect from the Commission's decision to implement expanded interconnection by providing a right to physical collocation.[553] We specifically permit the LECs to recover from interconnectors the direct cost of providing expanded interconnection services plus reasonable overhead loadings. We also are granting Tier 1 LECs increased pricing flexibility in conjunction with expanded interconnection.

238. Even If Physical Collocation Were a Taking, There Would Be No Fifth Amendment Violation. Even if physical collocation were deemed a taking, it does not violate the Fifth Amendment because the constitutional requirements will be satisfied and the LECs will receive just compensation. First, the Commission has authority to engage in a taking. The federal government, including Congress, has broad authority to take property for a public purpose.[554] Congress by legislative action can delegate its authority

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sale requirement was reasonably related to our legitimate objective of protecting the ratepayer's equitable share of the gains on regulated assets and the public's interest in the availability of reasonably priced CPE. Id. at 1295.

549 467 U.S. 986 (1984).

550 467 U.S. at 1004-08.

551 467 U.S. at 1007 (citations omitted).

552 467 U.S. at 1007-08.

553 Removing barriers to access competition will present the LECs with increased competitive challenges whether accomplished through virtual or physical collocation.

554 See Berman v. Parker, 348 U.S. 26, 33 (1954) ("Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear . . . the power of eminent domain is merely a means to an end"). Accord Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 239-40 (1984).

to an independent agency such as this Commission.[555] We have broad delegated authority from Congress under Sections 1 and 4 of the Communications Act,[556] as well as specific authority under Title II of the Act to regulate interstate common carriers in the public interest.[557] In providing for an interconnector right to physical collocation, we are exercising our statutory authority.

239. Second, the physical collocation requirement serves a public purpose. We have concluded that giving interconnectors a right to physical collocation is necessary to ensure prompt achievement of the full benefits of expanded interconnection for special access. Furthermore, the "public purpose" requirement is satisfied even where private parties (e.g., interconnectors) use the affected property, rather than the general public. It is necessary only that the action benefit the public.[558] The purpose of physical collocation is to bring the overall benefits of enhanced competition in the interstate special access market to the United States economy.

240. Finally, by requiring that Tier 1 LECs receive compensation from interconnectors, we are providing a mechanism for the payment of

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555 See Southern California Financial Corp., 634 F.2d 521, 523 (Ct. Cl. 1980) (congressional authorization can be express or implied), cert. denied, 451 U.S. 937 (1981). See generally Monsanto, 467 U.S. at 1010-14 (in holding that EPA use and disclosure of trade secret data under federal statute could constitute a taking, Court did not question agency's authority to engage in taking).

556 47 U.S.C. §§ 151 & 154.

557 See General Telephone Co. of the Southwest v. United States, 449 F.2d 846, 864 (5th Cir. 1971) ("The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests"). See also Permian Basin Area Rate Cases, 390 U.S. 747, 768-74 (1968) (Federal Power Commission's rate regulations adopted pursuant to "just and reasonable standard" in Natural Gas Act were constitutional), reh'g denied, 392 U.S. 917 (1968).

558 For example, in Midkiff, the Supreme Court held constitutional a statute authorizing the state of Hawaii to take title to real property from lessors and transfer it to lessees. According to the Court, the fact that the property taken outright by eminent domain was transferred to private beneficiaries did not destroy the public purpose of the action. It was sufficient that the purpose of the transfer was to benefit the public as a whole by reforming the land oligopoly in Hawaii; the government may take property for a public purpose even if the government itself does not possess it. 467 U.S. at 241-45. See also CPE Detariffing, 95 FCC 2d at 1295-96 (in decision detariffing embedded CPE, Commission rejected AT&T's argument that even if there were just compensation, private property could not be taken for private use of another).

compensation,[559] and the LECs will have a Tucker Act right[560] to seek compensation or to challenge the "justness" of the amount in the Court of Claims.[561] Furthermore, the fact that Tier 1 LECs will receive compensation from interconnectors, rather than directly from the government, is inconsequential under the Fifth Amendment,[562] especially given the Tucker Act

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559 See Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194-95 (1985) (it is only necessary that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking; "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process [results in compensation], then the property owner [has no takings claim]"). See also Monsanto, 467 U.S. at 1013-14 (compensation may be agreed to by parties); Albrecht v. United States, 329 U.S. 599, 603 (1947) ("Fifth Amendment does not prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken"); Bauman v. Ross, 167 U.S. 548, 593 (1897) ("the estimate of the just compensation . . . may be entrusted by Congress to commissioners appointed by a court or by the executive"); Glosemeyer v. Missouri-Kansas Texas R. Co., 685 F. Supp. 1108, 1119-20 (E.D. Mo. 1988), aff'd, 879 F.2d 316 (8th Cir. 1989), cert. denied, 494 U.S. 1003 (1990) (Fifth Amendment only requires that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking), citing Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974) and Cherokee Nation v. Southern Kansas R. Co., 135 U.S. 641, 659 (1890). But see Florida Power Corp. v. FCC, 772 F.2d 1537, 1544-46 (11th Cir. 1985) (FCC does not have power to determine just compensation), reh'g denied, 778 F. 2d 793 (1985), rev'd on other grounds, 480 U.S. 245 (1987); Monongahela Navigational Co. v. United States, 148 U.S. 312, 327 (1893) (question of compensation is judicial, not legislative function).

560 The Tucker Act, 28 U.S.C. § 1491(a)(1), provides: "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded upon the Constitution, or any Act of Congress or any regulation of an executive department . . ."

561 Generally, a party claiming a Fifth Amendment taking by the United States can seek just compensation under the Tucker Act. Monsanto, 467 U.S. at 1016-17; United States v. Causby, 328 U.S. 256, 267 (1946). Where a taking occurs pursuant to statute, the statute need not specifically provide Tucker Act relief, but it must not expressly withdraw the Court of Claims jurisdiction under the Tucker Act. Monsanto, 467 U.S. at 1017 (where neither EPA statute, nor its legislative history addressed Tucker Act, Court treated statute as implementing an exhaustion requirement); Regional Rail Reorganization Act Cases, 419 U.S. 102, 125-27, 154-56 (1974) (jurisdiction of Claims Court depends on whether Congress withdrew Tucker Act remedy in statute; claim exists for any shortfall between compensation provided in statute and constitutional requirement of just compensation).

562 For example, in Monsanto, the Court upheld a federal statute that in operation allowed just compensation to be paid by a third party. The law authorized the EPA to use and disclose certain data submitted by an

remedy. For these reasons, our requirement that Tier 1 LECs provide physical collocation does not violate the Fifth Amendment and is constitutional.

C. Effect on the States

1. Separations

241. Notice. We tentatively concluded that expanded interconnection for interstate special access should not have adverse separations impacts on the states. We reasoned that even if increased interstate special access competition causes some special access lines to be reassigned to the state jurisdiction, there should be no harm to the states because comparable revenues and costs would shift to the state jurisdiction.[563]

242. Comments. Some of the LECs argue that the diversion of significant demand for special access (and ultimately, switched transport) to interconnectors would shift costs to the state jurisdiction[564] and could deprive state commissions of revenue streams that have been used to support local rates.[565] NYNEX states that separations impacts could be somewhat ameliorated if the state and interstate jurisdictions adopt complementary rules for expanded interconnection.[566] SW Bell argues that even complementary intrastate rules could result in increased costs to the states if the LECs are not allowed to compete effectively.[567] U S West asserts that

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applicant for a pesticide registration when the EPA later considered a subsequent application by another party, as long as the second applicant compensated the first one. Monsanto, 467 U.S. at 1013-14. Similarly, in Midkiff, the government bought land and then sold it to existing tenants. Midkiff, 467 U.S. at 233-34. Thus, in that case, the government acted only as an intermediary; the tenants effectively paid the compensation.

563 Notice, 6 FCC Rcd at 3269, ¶ 65.

564 Bell Atlantic contends that in its region, loss of half of special access demand would shift more than $30 million in costs to the state jurisdiction. Bell Atlantic Reply Comments at 14. SW Bell estimates that the proposals in the Notice would result in a shift of $73.9 million in costs from the interstate to the intrastate jurisdiction. SW Bell Reply Comments at 17-18 & App. B. NYNEX alleges that a 14% loss of demand for special access would lead to a $17.5 million shift of revenue requirements from the interstate to the state jurisdiction in New York state. NYNEX Reply Comments, Exh. E at 3-4.

565 See, e.g., Ameritech Reply Comments at 55-58; BellSouth Comments at 12-15; GTE Comments at 50; SW Bell Comments at 26-29; SNET Comments at 10-11; USTA Comments at 65-68; SW Bell Reply Comments at 15-18 & App. B; Texas Telephone Ass'n Reply Comments at 2; Rochester Reply Comments at 24-25.

566 NYNEX Comments at 67-68.

567 SW Bell Comments at 29.

the Commission has not sufficiently analyzed the separations impact of its proposals[568] and Cincinnati Bell contends that separations reform is necessary to enable LECs to compete fairly.[569]

243. TDS argues that expanded interconnection could shift costs to the intrastate jurisdiction that the LECs would be unable to recover, and thus impede infrastructure development in rural areas.[570] NTCA submits that requiring expanded interconnection for rural independent carriers would have substantial adverse effects.[571] They also argue that expanded interconnection could cause absurd separations results. Tallon Cheeseman proposes specific Part 36 changes that would facilitate interconnection while mitigating jurisdictional shifts.[572]

244. MFS agrees with the Commission's tentative conclusion that new interconnection arrangements for interstate special access will not have adverse separations effects on the states.[573] MFS argues that there should not be any change in the relative allocation of costs between the federal and state jurisdictions in the case of states that have authorized competition in the special access services market. MFS bases this conclusion on the belief that the relative amounts of interconnected services that CAPs provide for interstate and intrastate service should be the same after mandated interconnection as it was before.[574] It also contends that additional loop costs will not be shifted to the state jurisdiction even if the LECs lose material amounts of traffic due to expanded interconnection, in part because even under expanded interconnection, interconnectors will have to purchase one channel termination from the LEC.[575]

245. Several users argue that jurisdictional cost shifts or detrimental separations impacts are unlikely to result from expanded interconnection. They state that special access circuits are directly assigned to the interstate or intrastate jurisdiction along with the associated revenues. They argue that even in the unlikely event that a significant number of special access lines were reassigned to the intrastate jurisdiction, there would not be a burden on the states because any increase in costs would be

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568 U S West Reply Comments at 63-65.

569 Cincinnati Bell Reply Comments at 17-18.

570 TDS Comments at 17-21.

571 NTCA Comments at 2-15.

572 Tallon Cheeseman Reply Comments at 4-7.

573 MFS Comments at 112.

574 Id. at 112-113.

575 MFS Reply Comments at 15-16.

offset by an increase in revenues.[576]

246. Some state commissions are concerned that expanded interconnection would cause cost shifts from the interstate to the state jurisdiction, due to the likely diversion of interstate switched usage to special access.[577] Virginia argues that existing separations procedures would not ensure that the costs of LEC facilities used to implement interstate-only expanded interconnection offerings would be assigned solely to the interstate side, while the revenues received from CAPs might be assigned completely to the interstate jurisdiction. D.C. argues that jurisdictional separations should be changed to allocate special access costs based on a specified minimum interstate special access line count so as to mitigate jurisdictional cost shifts.[578]

247. Discussion. We are sensitive to the states' concerns regarding possible collateral separations effects resulting from the implementation of expanded interconnection for the provision of special access. Based on the record, however, we conclude that these possible effects of expanded interconnection do not warrant a delay in implementation of our proposal. Some costs may be reassigned to the states as an indirect result of special access expanded interconnection, but any such cost reallocation would not be of sufficient magnitude to undermine universal service or threaten state regulatory programs. Moreover, the measures that we are adopting to permit additional LEC pricing flexibility should mitigate any separations effects by permitting the LECs to compete vigorously for special access traffic.[579]

248. We must, however, determine whether the current separations rules should be revised to specifically identify the cost of providing expanded interconnection in order to assure a proper jurisdictional allocation of LEC costs.[580] Accordingly, in the Second Notice of Proposed Rulemaking in this proceeding, we ask the Federal-State Joint Board in CC Docket No. 80-286 to determine whether such changes are necessary to

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576 Ad Hoc Comments at 35. Accord CompuServe Comments at 4-5; GSA Comments at 21-22; ICA Comments at 15-16, 20.

577 Florida Comments at 20-21; Virginia Comments at 3-5; Alabama Reply Comments at 5-6.

578 D.C. Comments at 4-5; D.C. Reply Comments at 6-7.

579 See supra ¶ 172-86. By contrast, the LECs' estimates of separations shifts to the state jurisdiction assume that the LECs will not be given the freedom to compete and thus will lose very large portions of their special access traffic to the CAPs. See supra ¶ 15 & n.40.

580 Expanded interconnection will use certain LEC facilities differently than existing services and the traffic measurement criteria currently used for separations purposes will not necessarily reflect expanded interconnection arrangements.

ensure a reasonable jurisdictional allocation. If the Joint Board believes that this is necessary, we ask it to undertake the limited task of preparing recommended separations revisions designed to identify LEC expanded interconnection costs and revenues, and allocate them between the state and federal jurisdictions.[581] We believe that adoption of federal standards for special access expanded interconnection will assist the Joint Board in considering these matters.

2. Preemption

249. Notice. We did not propose to preempt state authority over intrastate access competition, although we recognized that federal policies may influence the development of access competition at the state level, just as state policies may affect federal developments.[582]

250. Comments. SW Bell argues that Commission action on expanded interconnection would in effect preempt state commissions from making their own determinations regarding collocation because neither LECs nor CAPs can identify intrastate versus interstate traffic.[583] GTE recommends that the Commission defer to the states to facilitate valid experimentation, ensure complementary state and federal expanded interconnection standards, accommodate differing state-specific conditions, and conserve the Commission's scarce dispute resolution resources by enabling state commissions to resolve complaints on an informal basis.[584] Ameritech also argues that the Commission should craft its rules to avoid conflict with state experiments.[585]

251. Several CAPs contend that no preemption issues are raised by the Notice because the rules would apply only to the carriage of interstate special access traffic.[586] MFS asserts, however, that to the extent the Commission prescribes rules for expanded interconnection architecture it would as a practical matter preclude any inconsistent state requirements.[587] MFS nevertheless argues that nothing in the proposed rules would affect the states' ability to determine their own pricing rules, or to preclude inter-

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581 Second Notice, ¶¶ 54-55.

582 Notice, 6 FCC Rcd at 3269, at ¶ 67.

583 SW Bell Comments at 31-34. See also Cincinnati Bell Comments at 2 n.5.

584 GTE Reply Comments at 15-28.

585 Ameritech Reply Comments at 54, 66-67. See also New York Comments at 13-14; NARUC Comments at 15.

586 Teleport Denver Comments at 14-15; MFS Comments at 24.

587 MFS Reply Comments at 7-9.

connection altogether.[588] MFS further argues that, while innovation and experimentation by the states has been very beneficial, it is important for the Commission to assert a national leadership role given the inconsistency among state interconnection policies, which ultimately could impair delivery of interstate services.[589] Teleport urges the Commission to be sensitive to state regulatory issues and to support further state initiatives in developing expanded interconnection.[590] Digital Direct, however, supports preemption, arguing that uniformity is necessary to facilitate competition and to assure that interconnectors and their customers are not subjected to multiple state standards that could result in inefficiencies and delays.[591]

252. Several state commissions express concern that federal action in this proceeding would effectively preempt state authority over intrastate access and exchange competition.[592] NARUC contends that expanded interconnection for interstate special access would give interconnectors de facto ability to provide intrastate service without detection, even in states that determine that expanded interconnection for intrastate service is not in the ratepayers' best interest. Thus, NARUC argues that any final rule should permit states to determine independently whether and how to allow collocated interconnection for service within their jurisdictions.[593] New York urges the Commission to recognize that state standards need not mirror federal standards, and proposes that the Commission require the LECs to submit detailed justification for using such regulatory differences to impose inefficient, differing architecture requirements in their intrastate and interstate interconnection offerings.[594] New York also suggests that if states adopt switched access expanded interconnection before the Commission does, the Commission should permit state-specific switched access expanded interconnection arrangements that complement intrastate arrangements.[595] Virginia proposes that no expanded interconnection arrangement be implemented unless approved by both the Commission and the state commission.

253. Discussion. Based on the record before us, we do not believe

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588 Id.

589 Id. See also MFS Ex Parte at 2 (Sept. 9, 1992).

590 Teleport Comments at 40.

591 DDI Comments at 5-7.

592 Michigan Comments at 16-17, 20; Alabama Reply Comments at 4-5; Arkansas/Missouri Reply Comments at 6-7.

593 NARUC Comments at 5-6, 14-15; NARUC Additional Comments at 6-8 (Nov. 27, 1991).

594 New York Comments at 13-14. See also Ameritech Reply Comments at 54.

595 New York Comments at 16.

that there is a need for preemption of existing state programs in order to permit initial implementation of expanded interconnection for interstate special access. Indeed, a number of states have played a leadership role in shaping the development of expanded interconnection. We have learned much from these state initiatives, which demonstrate the continuing vitality and importance of the states' role as laboratories for regulatory innovation.

254. In this Order, we are taking actions to minimize the potential conflict between differing federal and state expanded interconnection policies. Specifically, we are providing for exemptions from the requirement that interstate physical collocation be made available to interconnectors based on timely state regulatory or legislative decisions.[596] In addition, if a LEC offers both interstate and intrastate expanded interconnection using either a physical or virtual collocation regime, it should provide collocation in a manner that satisfies both federal and state requirements. These measures should help to reduce the potential for federal/state conflict and should limit the ability of LECs to attempt to use different approaches to expanded interconnection in the federal and state jurisdictions to unfairly disadvantage interconnectors.

255. We also expect the LECs and interconnectors to negotiate reasonable mechanisms to avoid double payment for LEC expanded interconnection facilities used for both state and interstate expanded interconnection. For example, if under a state physical collocation program, an interconnector has paid the full cost of space preparation, we do not expect additional interstate charges to be applied unless further work is required to permit interstate expanded interconnection.

D. Implementation Schedule and Dispute Resolution Procedures

1. Implementation Schedule

256. Notice. We proposed that LECs be required to implement expanded interconnection for DS1 and DS3 services as soon as possible after adoption of this Order.[597] With regard to other special access services, we proposed to allow LECs to implement the new rate structure changes for each of the four price cap special access service categories upon receipt of a request for expanded interconnection for one or more services in the category.[598]

257. Comments. MFS argues that the Tier 1 LECs should be required

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596 See supra ¶ 41.

597 Expanded interconnection for DS1 and DS3 services allows a third party to provide its own DS1 and DS3 service between a LEC central office and a third party premises. Under these arrangements, however, interconnectors will be able to connect to, and resell, other LEC services, such as voice grade special access.

598 Notice, 6 FCC Rcd at 3266, ¶ 44.

to make expanded interconnection for all special access services available immediately rather than only after a request is received because MFS does not believe there is a need for LECs to restructure their special access services when they file collocation tariffs. MFS suggests, however, that smaller LECs should not be required to file tariffs until an interconnection request is received.[599]

258. Some LECs contend that collocation for services other than DS1 and DS3 should not be required at this time.[600] Bell Atlantic asks for discretion, however, to respond to collocation requests for other services when technologically and economically feasible.[601] SW Bell argues that implementation of rate structure changes should be on a service by service basis, rather than by price cap baskets.[602]

259. Discussion. We conclude that the Tier 1 LECs should be required to implement special access expanded interconnection as soon as possible. We require these LECs to file tariffs for expanded interconnection for DS1 and DS3 service within 120 days from the date of release of this Order without waiting for requests for interconnection.[603] The tariffs are to be filed to be effective on 90 days notice. The tariffs are to make physical collocation generally available under uniform terms and conditions in all end offices and serving wire centers, as well as any subject remote nodes, although, as explained in more detail above,[604] rates for items such as floor space, power, and environmental conditioning may vary by office. The tariffs are also to make virtual collocation generally available in all study areas where intrastate virtual collocation arrangements are provided and in any study areas where the LEC has negotiated virtual collocation

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599 MFS Comments at 119-21.

600 Bell Atlantic Comments at A-14, SW Bell Comments at C-11-12, United Comments at 3.

601 Bell Atlantic Comments at A-14.

602 SW Bell Comments at C-12.

603 Once the initial expanded interconnection tariffs are filed, the LECs are to file tariffs to provide for the expanded interconnection of fiber optic and microwave special access services other than DS1 and DS3 service within 45 days of receipt of a bona fide request, to be effective upon 45 days notice. If a bona fide request for such services is made before the date of filing the initial expanded interconnection tariffs, the LECs are to make every effort to include those services in their initial expanded interconnection tariff filings. Further tariff revisions to cover additional services that could not be included in the initial tariff filing due to the lack of advance notice, are to filed as soon as possible.

604 See supra ¶ 158 (tariffing requirements for various connection charge rate elements).

arrangements with interconnectors.[605] After LEC expanded interconnection services become available in a particular study area, and the cross-connect element has been taken by at least one interconnector, we will permit the LEC to implement a system of density pricing in that particular study area.

260. If a LEC seeks an exemption from the general requirement that physical collocation be made available with respect to any specific central offices based on space availability, it should file a petition for such an exemption at the same time that it files its initial tariffs.[606] To facilitate tariff implementation, the initial tariff filing need not offer physical collocation in individual offices for which such exemption petitions have been filed. In the event that petitions for exemption based on space availability are denied with respect to any central offices, the LEC is to file tariff revisions within 14 days, effective on 15 days notice, to make physical collocation available in those offices.[607]

261. The initial tariffs are to offer physical collocation in all offices not covered by an exemption petition based on space availability, unless an exemption based on state regulation has already been granted. Petitions for exemption based on state regulatory grounds that are filed on or before the date of the initial expanded interconnection tariff filings will be acted upon within the tariff review period whenever possible.[608] In such cases, the initial tariff filing is also to contain the virtual collocation offering that the LEC would implement if its exemption petition based on state regulation is granted. If the exemption is granted, the LEC will be permitted to withdraw its physical collocation offering for the affected offices prior to its effective date, and implement the virtual collocation offering instead.

262. In addition, we wish to avoid unnecessarily delaying the benefits of interstate special access expanded interconnection in states where interconnection arrangements for intrastate special access already exist. Therefore, we require those LECs with existing intrastate expanded

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605 Any negotiated virtual collocation arrangements are to be made available to all interested parties throughout the study area, pursuant to the tariffing requirements described above. These requirements will force the LECs to offer both physical and virtual collocation in some central offices. We conclude that the public interest benefits of these requirements outweigh the burdens to the LECs of offering both forms of collocation in those central offices.

606 Such requests will be acted upon as expeditiously as possible

607 This procedure will not apply to the extent that it would make the tariff provisions for the offices involved effective prior to the effective date of the remainder of the expanded interconnection tariff filing. In such cases, the necessary tariff revisions are to be effective at the same time as the remainder of the expanded interconnection filing.

608 <u>See supra</u> ¶ 41.

interconnection arrangements to file on an expedited basis federal tariffs allowing interstate special access traffic to be carried over existing state arrangements pursuant to state rates[609] except for the contribution charge.[610] The establishment of these interim tariffs will permit expedited implementation of interstate special access expanded interconnection when feasible, accelerating the benefits of expanded interconnection and reducing potential LEC incentives for delay in implementing expanded interconnection tariffs reflecting the requirements in this Order.[611] The LECs subject to this requirement[612] are to file these interim tariffs within 30 days of release of this Order[613] to be effective on 21 days notice.

263. Finally, we believe that information on the implementation of special access expanded interconnection, and of resulting developments in the

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609 We find that the use of state rates in the interim interstate expanded interconnection tariffs is acceptable during the short period of time before the affected LECs file permanent tariffs that comply with the standards in this Order. We believe that the use of state rates in this instance is in the public interest, given our desire for expeditious implementation of expanded interconnection for interstate special access in those states where intrastate arrangements are already available, in order to foster the benefits of expanded interconnection. Accordingly, we waive the general requirements in Sections 61.38 and 61.49(g)-(i) of our rules, 47 C.F.R. §§ 61.38 & 61.49(g)-(i), that tariffs for new services be filed with cost support data, with respect to these interim expanded interconnection tariffs.

610 As a result, the LECs will not be allowed to include explicit or implicit contribution charges in these interim federal tariffs.

611 See Lincoln Tel. and Tel. Co., 659 F.2d at 1107-1108 (interpreting Section 154(i) as giving FCC authority to prescribe interim billing and collection arrangements in conjunction with an interconnection order).

612 This requirement applies to Central Telephone Co. of Illinois, Illinois Bell Telephone Co., New England Telephone and Telegraph Co., New York Telephone Co., and Pacific Bell. This requirement will also apply to Bell Telephone Co. of Pennsylvania (Bell of Pennsylvania) in the event that the Pennsylvania Public Utilities Commission allows the intrastate expanded interconnection tariff that the company filed on October 1, 1992 (or a modified version of that tariff) to go into effect within 90 days of the release of this Order. In that case, Bell of Pennsylvania is to file its interim interstate tariff within 21 days of the effective date of the Pennsylvania tariff, to be effective on 21 days notice.

613 Given the relatively limited administrative burdens that this requirement places on these LECs and the benefits of avoiding further delay in the implementation of interstate expanded interconnection, we conclude that good cause exists to make this requirement effective less than 30 days from publication of this Order in the Federal Register.

interstate access marketplace, is important. Accordingly, we require the seven Regional Bell Operating Companies and GTE[614] to file reports that identify which parties are using expanded interconnection in their service territories and the offices in which they are interconnected two and four years after their initial interstate expanded interconnection tariffs take effect.[615]

2. Dispute Resolution Procedures

264. Comments. Several CAPs urge the Commission to establish expedited complaint resolution procedures or an expedited arbitration system to resolve implementation disputes between the LECs and interconnecting parties to prevent unnecessary delays in implementation of expanded interconnection.[616] They also urge the designation of specific staff to mediate such disputes. Locate also suggests that a procedure be established, as was done in New York, permitting a party to request a task force comprised of all parties to the dispute and chaired by a Commission staff person. Locate proposes that the task force be required to meet within thirty days and given forty-five days to reach a consensus, after which the Commission staff member would present the majority position to the Commission.[617] Other parties could file opposing comments and the Commission would issue a ruling based on the record compiled during the negotiations. Teleport asks that disputes be responded to within thirty days.[618]

265. The LECs generally argue that no expedited dispute resolution procedure is necessary, and that any disputes can be handled through the Commission's complaint process. Pacific and NYNEX, for example, argue that the Commission should promulgate general guidelines under which parties can work out satisfactory arrangements, and contend that detailed rules or novel dispute resolution procedures are unnecessary.[619]

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614 We are applying this requirement only to the largest eight LEC holding companies because these companies account for over 90% of the local exchange market, and because we wish to minimize the information gathering burden on other carriers. If they wish, however, smaller Tier 1 LECs may voluntarily provide such information.

615 Based on the information contained in these reports, we will decide whether to require similar reports in the future. We delegate authority to the Chief, Common Carrier Bureau, to determine the format and the specific information to be provided in these reports.

616 Locate Comments at 42, 48; Teleport Denver Comments at 7-8; MFS Comments at 19-21; Teleport Comments at 37-38.

617 Locate Comments at 48.

618 Teleport Comments at 38.

619 Pacific Reply Comments at 73-74; see also NYNEX Reply Comments at Exh. 9.

266. Discussion. It is important that there be an expeditious implementation of interstate expanded interconnection. Accordingly, we have resolved a number of implementation issues in this Order, placing various specific requirements on the LECs. We have also required an expeditious filing of expanded interconnection tariffs by the LECs, recognizing that certain implementation issues will be resolved in the tariff review process. Thus, we believe that there will be relatively few additional implementation issues to be resolved after the expanded interconnection tariffs go into effect. Resolution of any remaining disputes can be quick and efficient. We conclude that the development of specific, detailed dispute resolution procedures, or the designation of a formal ombudsman or task force, are not necessary. In addition, parties will have access to the Commission's Alternative Dispute Resolution (ADR) procedures as a possible path for resolution of certain disputes.[620]

IX. NOTICE OF PROPOSED RULEMAKING ON AMENDMENT OF THE PART 69 ALLOCATION OF GENERAL SUPPORT FACILITY COSTS

267. As discussed above,[621] we are not permitting the LECs to impose a contribution charge at this time. Instead, we are proposing to eliminate the only regulatory mechanism identified in the current record as potentially warranting a contribution charge. Section 69.307 of our Rules[622] requires the LECs to apportion GSF investment among categories based on investment in central office equipment, information origination/termination equipment, and cable and wire facilities excluding Category 1.3, the investment in subscriber lines.[623] This allocation also has collateral effects on the allocation of GSF expenses,[624] as well as other operating expenses.[625] As a result, costs are under-allocated to the common line category and over-allocated to other access categories, including special access and transport.

268. The current language in Section 69.307 was designed to ensure that the adoption of certain changes to the separations and accounting rules would be revenue-neutral with respect to the interstate common line

620 Use of Alternative Dispute Resolution Procedures, Initial Policy Statement and Order, 6 FCC Rcd 5669 (1991). See also Use of Alternative Dispute Resolution Procedures, Memorandum Opinion and Order, GC Docket No. 91-119, FCC 92-316 (released July 10, 1992).

621 See supra ¶¶ 143-49.

622 47 C.F.R. § 69.307.

623 See 47 C.F.R. § 36.154(a) for a definition of Category 1.3.

624 See, e.g., 47 C.F.R. § 69.401(a)(2).

625 See, e.g., 47 C.F.R. §§ 69.309, 69.401(a)(1), 69.402(b), 69.403, 69.406(a)(1) & (7), 69.408 & 69.411.

category.[626] We now tentatively conclude, however, that the benefits of this are outweighed by the potential adverse effects on the development of competition in interstate access markets.[627]

269. We therefore propose to modify Section 69.307 by deleting the words "excluding Category 1.3," and we invite interested parties to comment on this proposal. We also ask interested parties to propose specific methodologies for calculating a contribution charge to recover over-allocated GSF for use in the event that we do not ultimately adopt our proposal for reallocation of GSF costs.

X. CONCLUSION

270. In this Order, as a part of its efforts to bring customers the full advantages of newly developing competition, the Commission takes an important step toward increased competition in the provision of interstate access services by removing barriers to competitive interconnection found in LEC special access rate structures. This Order requires Tier 1 LECs to offer expanded opportunities for interconnection with their networks for the provision of interstate special access service. Tier 1 LECs are generally required to offer expanded interconnection through physical collocation to interconnectors that request it and, under certain limited circumstances, virtual collocation arrangements as well. This Order also provides that expanded interconnection of third party transmission facilities will be available to all interested parties, including CAPs, IXCs, and end users. The LECs will include connection charges in their tariffs implementing our expanded interconnection policy that are designed to compensate the LECs for services offered to interconnectors. The Commission is also authorizing some additional pricing flexibility to enable the LECs to price their own services in response to competition. Together, these measures establish an equitable regulatory framework for increased competition in the interstate special access market.

XI. PROCEDURAL MATTERS

A. Report and Order on Expanded Interconnection with Local Telephone Company Facilities — Regulatory Flexibility Act

271. In the Notice of Proposed Rulemaking in this proceeding, we certified that the proposed rule changes related to expanded interconnection would apply only to carriers providing interstate access transmission services, which are large corporations or affiliates of such corporations,

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626 Amendment to Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It With Part 36, Jurisdictional Separations Procedures, 2 FCC Rcd 6447, 6452 (1987).

627 This change would result in minor increases in total switched access costs in the Subscriber Line Charge (SLC) in those few jurisdictions where the current SLC is below the $3.50 cap, or the multi-line business SLC is below the $6.00 cap.